

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
MOLOKAI PUBLIC UTILITIES, INC.)
For Review and Approval of Rate)
Increases, Revised Rate Schedules,)
and Revised Rules.)

DOCKET NO. 2009-0048

ORDER GRANTING INTERVENTION TO THE COUNTY OF MAUI,
WEST MOLOKAI ASSOCIATION, AND STAND FOR WATER

And

OPINION OF LESLIE H. KONDO, COMMISSIONER,
CONCURRING IN PART AND DISSENTING IN PART

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PUBLIC UTILITIES
COMMISSION

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ORDER GRANTING INTERVENTION TO THE COUNTY OF MAUI,
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By this Order, the commission grants, subject to the conditions noted in Section III herein: (1) the COUNTY OF MAUI's ("County") Motion to Intervene filed on September 11, 2009;¹ (2) WEST MOLOKAI ASSOCIATION's ("WMA") Motion to Intervene filed on September 11, 2009;² and (3) STAND FOR WATER's Motion to Intervene, filed on September 14, 2009.³ The commission grants the motions to intervene in this proceeding, which relate to MOLOKAI PUBLIC UTILITIES, INC.'s ("MPU") amended application for commission approval of a general rate increase and other related

¹Motion to Intervene; Exhibit A; and Certificate of Service, filed on September 11, 2009 (collectively, "County's Motion to Intervene").

²Motion to Intervene; and Certificate of Service, filed on September 11, 2009 (collectively, "WMA's Motion to Intervene").

³Motion to Intervene; Memorandum in Support; and Certificate of Service, filed on September 14, 2009 (collectively, "Stand for Water's Motion to Intervene"). In this Order, Stand for Water is referred to interchangeably as SFW.

matters, filed on June 29, 2009.⁴ In addition, the commission, on its own motion, names Molokai Properties Limited ("MPL"), dba Molokai Ranch, as a party in this proceeding.⁵

I.

Background

MPU is a public utility that provides water service in the Kaluakoi area on the island of Molokai. MPU is ultimately a wholly-owned subsidiary of MPL. In addition to MPU, MPL's public utility subsidiaries include Wai'ola O Molokai, Inc. ("Waiola" or "WOM") and MOSCO, INC. ("Mosco"), collectively referred to as the "Utilities." According to MPU, MPL has ceased its non-utility operations on the island of Molokai.⁶

MPU presently provides potable water to the Kaluakoi Resort, Ke Nani Kai and Paniolo Hale Condominiums, Kaluakoi Villas, Papohaku Ranchlands, Moana Makini subdivisions, and County parks.⁷ MPU's utility system utilizes water that is

⁴Amended Application; Exhibits MPU 1 to MPU 11; Exhibit MPU-T-100; Attachment 1; Verification; and Certificate of Service, filed on June 29, 2009 (collectively, "Amended Application").

⁵With the granting of the three motions to intervene and the commission's action of naming MPL as a party herein, the Parties are MPU, MPL, Intervenor County, WMA, and Stand for Water, and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate" or "DCA"), an ex officio party to this proceeding, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

⁶Amended Application, Exhibit MPU-T-100, at 18 and 29.

⁷MPU clarifies and confirms that it does not provide non-potable water service within its service territory. See MPU's letter, dated September 15, 2009.

pumped from Well 17 and delivered to the Molokai Irrigation System ("MIS"), described as follows:

[MPU's] water source is Well 17, which is operated using a gas-powered pump. The Well 17 water is delivered into an enclosed storage tank at the well site. Water from the well storage tank is provided to [WOM] customers through a metered connection at Kualapuu, between Well 17 and the delivery to the [MIS] storage and transportation system. The remaining water from the well storage tank is then delivered to MIS through a metered connection where it is mixed with MIS water in an open reservoir, for which MIS charges a monthly fee for use of its facilities and retains 10% of the water delivered to its system.

MIS delivers the water to a transmission main, which delivers the water to the Mahana pumping station through a metered connection. The water is then sent to the Puunana Water Reservoir where it is blended with the Mountain Water and delivered to the MPU Treatment facilities through a metered connection. The water is then treated and delivered through a Clear-Water holding facility to the Maunaloa Reservoir and then to MPU and WOM customers as follows:

1. Through the Maunaloa meter
 - a. WOM customers receive the treated water
 - b. MPU customers in Moana Makani also receive treated water
2. Through the Kaluakoi meter
 - a. MPU customers receive treated water

Amended Application, Exhibit MPU 1, at 1-2.

Molokai Irrigation System

The [MIS] transports water via a 10-mile transmission link to an open reservoir at Kualapuu, where it is stored prior to entering a distribution network to certain areas on the island of Molokai, Hawaii. The MIS is administered by the state of Hawaii Department of Agriculture (DOA). Kaluakoi Water LLC has paid fees to rent "space" in the MIS from the DOA to facilitate the transport of water to [MPU's]

customers. In 2008, [MPU] paid to the DOA \$130,177 for MIS usage. As there currently is no alternative means of transporting water to these customers, management expects to utilize the MIS through this informal agreement with the DOA, until an alternative transmission method is in place or a formal agreement is executed.

Amended Application, Exhibit MPU 2, Schedule 4, at 8.

On June 29, 2009, MPU filed its amended application seeking a general rate increase and other related matters.⁸ On September 3, 2009, the commission held a public hearing on MPU's Amended Application in Kaunakakai, Molokai, for the purpose of providing interested persons with the opportunity to appear and comment on MPU's requests. Over twenty persons from the general public appeared and testified at the public hearing, including counsel for the County and WMA, respectively, and members of Stand for Water.

⁸Previously, in In re Molokai Public Util., Inc., Docket No. 02-0371 ("Docket No. 02-0371"), MPU's 2003 test year rate case, the commission approved various increases in MPU's rates and charges, effective from July 2003, including an increase in the monthly water consumption charge to \$3.18 per thousand gallons ("TG"). See Docket No. 02-0371, Decision and Order No. 20342, filed on July 18, 2003; Order No. 20353, filed on July 24, 2003; and Order No. 20356, filed on July 31, 2003. Subsequently, in In re Molokai Public Util., Inc., Wai'ola O Molokai, Inc., and Mosco, Inc., Docket No. 2008-0115 ("Docket No. 2008-0115"), the commission, on its own motion, approved a temporary increase in MPU's monthly water consumption charge, from \$3.18 per TG to \$6.04 per TG, effective from September 1, 2008 to February 28, 2009. Docket No. 2008-0115, Order Approving Temporary Rate Relief for Molokai Public Utilities, Inc. and Wai'ola O Molokai Inc., filed on August 14, 2008. The commission later extended MPU's temporary monthly water consumption charge of \$6.04 per TG until August 2009, or until the commission rules on MPU's recent application for a general rate increase. Docket No. 2008-0115, Order Approving Extension of Temporary Rate Relief and Request for an Extension to File General Rate Case Applications, filed on February 24, 2009.

On September 11, 2009, the County and WMA filed their respective motions to intervene. The County, in its filing, incorporates by reference its motion to intervene filed on September 11, 2009, in In re Wai'ola O Molokai, Inc., Docket No. 2009-0049. On September 14, 2009, Stand for Water filed its Motion to Intervene. Based on its review of the motions to intervene, the commission, on September 15, 2009, issued a clarifying information request (PUC-IR-101) to the movants WMA and Stand for Water, with a deadline to reply by September 23, 2009.

On September 18, 2009, MPU filed its: (1) Memorandum in Opposition to the County of Maui's Motion to Intervene;⁹ and (2) Memorandum in Opposition to WMA's Motion to Intervene.¹⁰ Thereafter, on September 21, 2009, MPU filed its Memorandum in Opposition to Stand for Water's Motion to Intervene.¹¹ On September 22, 2009, Stand for Water timely submitted its response

⁹MPU's Memorandum in Opposition to the County of Maui's Motion to Intervene; and Certificate of Service, filed on September 18, 2009 (collectively, "MPU's Memorandum in Opposition to the County's Motion to Intervene").

¹⁰MPU's Memorandum in Opposition to WMA's Motion to Intervene; Attachment A; and Certificate of Service, filed on September 18, 2009 (collectively, "MPU's Memorandum in Opposition to WMA's Motion to Intervene").

¹¹MPU's Memorandum in Opposition to Stand for Water's Motion to Intervene; and Certificate of Service, filed on September 21, 2009 (collectively, "MPU's Memorandum in Opposition to Stand for Water's Motion to Intervene"). On September 22, 2009, the County, as a non-party movant, filed statements of no opposition to the respective motions to intervene filed by WMA and Stand for Water. Given the County's status as a non-party movant at the time of the filing of its statements, the commission will not consider the County's statements in its decision-making herein. See HAR § 6-61-41(d) (a party that does not oppose a motion shall notify the commission and opposing attorneys).

to PUC-IR-101. Based on its review of MPU's written oppositions, the commission, on September 23, 2009, issued a clarifying information request (PUC-IR-102) to Stand for Water, with a deadline to reply by September 29, 2009.

On September 25, 2009, MPU filed a Motion for Leave to File a Response to Stand for Water's Response to PUC-IR-101.¹² On September 29, 2009, Stand for Water timely submitted its response to PUC-IR-102.¹³

A.

County's Motion to Intervene

The County, in support of its Motion to Intervene, asserts:

1. "The County is a customer of the utility and depends upon water service for fire protection and water for County beach parks located on the island of Molokai."¹⁴

As a customer, the County has a direct and significant financial interest in this proceeding that cannot be adequately represented by the Consumer Advocate, which has taken positions

¹²MPU's Motion for Leave to File a Response to Stand for Water's Response to PUC-IR-101; Response to Stand for Water's Response to PUC-IR-101 ("Response"); and Certificate of Service, filed on September 25, 2009 (collectively, "MPU's Motion for Leave").

¹³On September 23, 2009, WMA filed a letter requesting an extension of time to file a response to Stand for Water's Motion to Intervene, and on October 2, 2009, WMA withdrew its request. In addition, on October 7, 2009, submitted its belated response to PUC-IR-101, which the commission has not considered in its adjudication of the motions to intervene.

¹⁴County's Motion to Intervene, at 1; see also id. at 6 and 8.

adverse to the County in other related proceedings. Specifically, in Docket No. 2008-0115, the commission's temporary rate relief investigative proceeding, the Consumer Advocate reluctantly supported the temporary rate increase for MPU, and "stat[ed] that the temporary rate increase period was to allow the County or a third party to take over the [Molokai Ranch] Utilities' system."¹⁵ The County is concerned that the Consumer Advocate may take similar positions in this proceeding, Docket No. 2009-0048, and thus, the County must protect its interests.

2. In Docket No. 2008-0115, the commission named the County as a party to the commission's temporary rate relief investigative proceeding, noting that the County has an interest in ensuring that its citizens have access to basic water and wastewater services. The commission, in Docket No. 2008-0115, "also commented on the potential need for the County or some other third party to take over if the [Molokai Ranch] Utilities shut down. Accordingly, the County has a right to participate in the proceedings because the County must be afforded the opportunity to protect its interests."¹⁶

3. The County's participation herein will not broaden the issues or delay the proceeding. Instead, its participation will assist the commission in developing a sound record, particularly in "ensur[ing] that the PUC is fully and properly informed of the Utilities' true financial picture[.]"¹⁷

¹⁵County's Motion to Intervene, at 10.

¹⁶County's Motion to Intervene, at 8 (citation omitted).

¹⁷County's Motion to Intervene, at 11.

4. "The County opposes the pending rate applications because the financial data submitted to the PUC does not accurately portray the Utilities' complete financial picture. The State Department of Health's hearing officer has determined that the Utilities' and the parent company, Molokai Properties, Ltd., are one and the same. The First Circuit Court affirmed that decision in its entirety. Therefore, the parent company's finances, and all of the inter-company transactions, must be considered."¹⁸

5. If the commission denies the County's Motion to Intervene, the County should be permitted to participate in this proceeding as a participant.

B.

WMA's Motion to Intervene

As noted in its Motion to Intervene:

WMA is a non-profit corporation organized to monitor the management, maintenance, protection, preservation, architectural control, and development of its members' properties of the Island of Molokai and to promote the health, safety, and welfare of its members, within the area commonly referred to as "West Molokai" or "Kaluakoi."

WMA's membership is comprised of owners of 800-plus properties located within the Kaluakoi/West Molokai area. A majority of the single residential properties are vacant lots, most of which are provided standby water service. Water service is provided to WMA's members by MPU.

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¹⁸County's Motion to Intervene, at 12 (footnote and text therein omitted).

The Kaluakoi/West Molokai area includes homes and lots in the Papohaku Ranchlands area, three condominium projects, homes and lots on the recently closed golf course, Moana Makani homes and lots, and Papohaku Beach Park, as well as other public beaches and facilities, and fire hydrants situated adjacent to streets and loop roads. All of the homes, condominiums, and public facilities require the essential service provided by MPU in order to protect private and public health and safety.

WMA's Motion to Intervene, at 5-6.

WMA, in support of its Motion to Intervene, contends:

1. WMA's fundamental objective is to ensure the reliable provision of potable water service at reasonable rates over the long-term. WMA's specific interests in this proceeding will not be represented by any of the existing parties, and its participation will assist the commission in developing a sound and complete record. Of particular note:

WMA has valuable information which may ultimately assist the Commission in this proceeding. WMA's members have been closely monitoring the water situation on the island for several years. Also, WMA is intimately familiar with controversies regarding the permitting and transportation of water from Well No. 17 across Molokai's central plateau, to West Molokai.

WMA was a party to the permitting process of the Hawaii Commission on Water Resource Management ("CWRM"). WMA can accurately represent to this Commission events that transpired in the CWRM cases, and the subsequent appeal.

WMA has access to information unavailable to DCA and the Commission, which information will be [of] assistance to the Commission in arriving at a better informed decision in this case.

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. WMA has been an active party to CWRM's permitting processes MPU's legally enforceable right to pump water from Well No. 17 has been placed in jeopardy by laches and lapses

by MPL and MPU. WMA knows the situation and will provide material evidence on this and similar issues.

WMA's Motion to Intervene, at 8-10; see also id. at 2-4 (water quality; financial records; adjustment clauses; assignment of cost recovery; Molokai Irrigation System/Department of Agriculture agreement; adequacy of management; water losses; and breached agreements, County of Maui) and 12-14 (normalization; cost causation; credibility; and MPU's burden of proof).

2. WMA's interests are distinguishable from the Consumer Advocate's interests, and due to the DCA's limited staffing, focus on the Hawaii Clean Energy Initiative generic proceedings, and potential conflict of interest, the Consumer Advocate's best efforts in this proceeding, Docket No. 2009-0048, may not be sufficient. With respect to the potential conflict of interest, "major cost components of the two water utilities need to be re-allocated between the companies (or the common sole shareholder), in order to more appropriately align variable costs with usage rates, and fixed costs to regularly-recurring and standby fees and charges. WMA can do this analysis and make better arguments than any other party, including DCA."¹⁹

Moreover, "WMA represents the majority of MPU's customer base. WMA will work with MPL, MPU, DCA and the Commission in a constructive fashion, seeking a long-term solution. In the course of those efforts, WMA can make valuable contributions to the record that no other party can offer."²⁰

¹⁹WMA's Motion to Intervene, at 9.

²⁰WMA's Motion to Intervene, at 9.

3. WMA's intervention herein will not broaden the issues or delay the proceeding.

4. At this juncture, WMA's tentative position is that MPU's proposed increases in its water rates are unjust, unreasonable, and not justified by the reliable evidence. In this regard, "WMA's preliminary adjustments to MPU's rate justifications are based on well-established rate-making principles, including (a) normalization, (b) cost causation, (c) credibility, and [(d)] placement of the burden of proof on the Applicant."²¹

5. "Discrepancies exist between MPU's audited accounts, on the one hand, and the unaudited accounts initially verified as true by MPU. The significance of the discrepancies needs to be examined and assessed. Because corporate veils between and among MPU, Mosco, Inc., and Waiola O Molokai, Inc. have been pierced, misrepresentations attributable to the owner of MPU/MPL may be attributable to the Singapore-based parent of MPL. Intentions need to be discussed."²²

C.

Stand for Water's Motion to Intervene

As described in its Motion to Intervene, Stand for Water is an unincorporated Hawaii association that was organized in response to the applications for rate increases filed by MPU and Wai'ola. Moreover:

²¹WMA's Motion to Intervene, at 11.

²²WMA's Motion to Intervene, at 14.

Stand for Water's mission is to insure that:

- Water utility rates and charges are just and reasonable;
- Drinking water supplied by the utilities is safe;
- Water delivery infrastructure is kept in good repair;
- Legal obligations to supply water are honored; and
- Moloka'i's limited water resources are protected.

The group is composed of ratepayers from all of the communities served by these two utilities: Kala'e, Kualapu'u, Maunaloa, and the West End of Moloka'i. In addition to these ratepayers, the group also includes non-ratepayers who rely on the same water supply infrastructure that serves the residential customers of these utilities. These non-ratepayers include Ho'olehua Homestead farmers whose crops are dependent on water from the Molokai Irrigation System, which is used by [sic] to transport water to its West End customers.

Stand for Water's Memorandum in Support, at 2.

Stand for Water, in support of its Motion to Intervene, asserts:

1. Stand for Water's members have a substantial interest in this proceeding, which includes: (A) the detrimental effects of the commission's potential approval of MPU's proposed rate increases; (B) critical health and safety interests in that the commission should not grant MPU's request for additional rate increases without first requiring the water utility to repair and upgrade its existing system and improve the quality of its water, which routinely fails quality tests for toxins and sediments; (C) the physical condition of the water system; (D) the legality of MPU's water system; and (E) the reliability of MPU and its parent, MPL.

With respect to its latter two concerns, Stand for Water explains:

Stand for Water members also have a strong interest in the legality of MPU's water system. Neither MPU nor its parent [MPL] has a valid permit to pump water from Well 17, which supplies a portion of the water delivered to MPU customers. In December 200[7], the Hawai'i Supreme Court invalidated all pumping permits for the well. To date neither the utility nor its parent company has filed for new permits, but MPU continues to pump water from Well 17 without a permit.

MPU's parent company, MPL, is also on notice from the State Department of Agriculture that it should cease using the agricultural Moloka'i Irrigation System (MIS) for transmission of water to the West End until an environmental assessment and/or EIS has been completed. This notice was issued after MPL's contract to use the MIS expired in 2006. But MPU continues to use the MIS transmission system despite the lack of a contract to do so. This creates conflict with farmers in Ho'olehua, who also rely on the MIS for irrigation water. They are often ordered to cut back water use during the dry summer months in order to protect the West End domestic users who get their drinking water from the same system.

And finally, Stand for Water members have a substantial interest in the reliability of both the utility and its parent, MPL. The PUC initiated rate increase proceedings in 2008 after MPL announced that it would not continue to provide water utility service to its customers. But even after the PUC approved the increased rates, MPL refused to commit to continue operating the utilities. The County of Maui was finally forced to file suit against MPL to compel the company to honor more than 30 contractual promises to provide utility services, and the case is still in litigation. MPU is owned by a foreign company (Hong Kong's Guoco Group), in possible violation of HRS §269-17.5 which bars majority foreign ownership of Hawai'i utilities. Even if the County wins its lawsuit, it may be difficult to enforce a U.S. court decision against this foreign owner, should it decide to abandon its water utilities.

Stand for Water's Memorandum in Support, at 4-5.

2. There are no other means by which Stand for Water can protect its members' interests, and no other existing or prospective party is responsible for protecting such interests. In this regard, "the Consumer Advocate will be focused on determining whether the proposed rates and charges are adequately justified by the utility. No other party will address issues regarding health and safety, water quality, or the legality and reliability of the system."²³

3. Stand for Water will assist the commission in developing a sound record, as its members include individuals with intimate knowledge of MPL's water systems and business practices. In particular, Stand for Water has already identified eight individuals who have agreed to serve as expert witnesses in this proceeding in the following subject areas that affect the association's interests: (A) MPL's accounting procedures; (B) waterlines, maintenance, infrastructure system; (C) drinking water quality; (D) water and west end farming; (E) revenues from MPL's land sales, water meters, and attempts to purchase the Utilities; (F) water delivery and distribution systems; (G) MIS, Well 17, and the impact of MPL's use of the MIS on farming; and (H) MPL's internal operating and accounting practices.

²³Stand for Water's Memorandum in Support, at 6. Concomitantly:

It is possible that the West Molokai Association of landowners will also ask to intervene in these proceedings. But if this group is permitted to become a party, it is unlikely that its interests will overlap with those of Stand for Water.

Stand for Water's Memorandum in Support, at 7.

4. Stand by Water's concerns and allegations are reasonably pertinent to and do not unreasonably broaden the issues already presented, its participation herein will not unduly delay the proceeding, and it opposes MPU's application for a general rate increase.

5. Should the commission grant Stand by Water intervenor status, it will secure representation by an attorney in good standing.

D.

MPU's Opposition

MPU opposes all three motions to intervene filed in this proceeding. In support thereto, MPU asserts:

1. The movants' interests are adequately and sufficiently represented by the Consumer Advocate, and there is nothing in the docket record to preclude the Consumer Advocate from fulfilling its statutory mandate to represent all consumers in this proceeding. Of particular note:

A. "Although the County asserts that the proposed rate increase would have a significant financial impact on it as a customer, it should be noted that the County is not charged for water utilized for fire fighting purposes, including water used from fire hydrants. Rather, the County is only charged for its metered use of water at a handful of County public parks within

MPU's service area, the combined monthly charges for which total less than \$500.00."²⁴

B. The County's attempt to show that its interests are different from the Consumer Advocate's interests "relate to interests in other proceedings or dockets, which involve issues which are not relevant for ratemaking purposes and are not at issue in this proceeding. Specifically, the County refers to the following dockets before the Commission: (1) Docket No. 2008-0115, in which the Commission sua sponte initiated a proceeding to provide temporary rate relief to MPU, Wai'ola O Moloka'i, Inc. ('WOM') and MOSCO, Inc. ('Mosco') (collectively, the 'Utilities') ('Temporary Rate Proceeding'); and (2) Docket No. 2008-0116, in which the County filed a Formal Complaint against the Utilities alleging that the Utilities' threat of cessation of services would cause Molokai customers harm."²⁵ In response thereto, MPU asserts:

Since the Temporary Rate Proceeding, MPU has been committed to and has continued to provide water service to all of its customers. By letter dated September 8, 2008, MPU (along with WOM and Mosco) stated that with the temporary rate increase in effect, it was "confident that the Utilities are able and therefore will remain operational for the period of the temporary rate increase . . . and therefore confirm to the Commission that the Utilities will continue in operation in accordance with the Temporary Rate Relief Order, and hereby revoke and rescind all prior notices of intent to terminate operations." This general rate case is filed for the purpose of ensuring that MPU will have the resources necessary and critical to MPU's continued

²⁴MPU's Memorandum in Opposition to the County's Motion to Intervene, at 9 n.12.

²⁵MPU's Memorandum in Opposition to the County's Motion to Intervene, at 10.

operation. Any concerns in this proceeding, therefore, that the County may be required to take over the Utilities, aside from being unfounded and misplaced, are outside the scope of this rate making proceeding and should not be considered as a reasonable basis for intervention.

MPU's Memorandum in Opposition to the County's Motion to Intervene, at 11-12 (brackets, footnote, and citation therein omitted).

C. WMA and Stand for Water fail to assert a statutory or other right to intervene, and WMA's broad allegations of a potential conflict of interest on the Consumer Advocate's part are unsupported. Moreover, the commission denied WMA's motions to intervene in Dockets No. 2008-0115 and No. 2008-0116, and in Docket No. 2008-0115, the commission reasoned that WMA's interests could be adequately represented by the Consumer Advocate.

2. The movants' participation as intervenors herein will unreasonably broaden the issues, unduly delay the proceeding, and will not assist in developing a sound docket record. In this regard:

A. The issues and concerns raised by the movants with respect to MPU's fitness as a public utility are not relevant for a utility ratemaking proceeding. Instead, the commission typically reviews the financial fitness of a public utility in connection with the issuance of a certificate of public convenience and necessity or the sale or transfer of a utility's assets or operations.

B. Contrary to WMA and Stand for Water's assertions that this ratemaking proceeding is the only available forum to

consider their alleged water-related issues and concerns, including WMA's assertion regarding the appointment of a receiver, WMA and Stand for Water's asserted issues and concerns are outside the scope of this proceeding. Instead, the commission has the authority to open a separate docket to explore issues such as a public utility's fitness and reliability.

C. Contrary to its claim, WMA was not a party to the CWRM contested case proceeding.

D. The movants have not shown any specialized interest or knowledge that the Consumer Advocate does not itself have or could not obtain through discovery.

E. The County's stated concern with respect to its interests in other dockets is wholly irrelevant to this ratemaking proceeding. "Moreover, it is apparent from the County's Motion to Intervene that it intends to utilize the proceeding as a means to raise and address issues regarding MPU's fitness and/or 'piercing the corporate veil'²⁶ that are either irrelevant or are more properly addressed in other dockets or proceedings."²⁷

3. Certain Stand for Water members clearly lack the requisite standing to intervene. Of particular note, Stand for Water's membership includes non-ratepayers who rely on the same water supply infrastructure, and the movant has not explained or

²⁶Footnote 24 of MPU's memorandum states: "In its Motion to Intervene, the County refers to a Department of Health proceeding, which is not applicable or relevant to the instant proceeding." MPU's Memorandum in Opposition to the County's Motion to Intervene, at 16 n.24.

²⁷MPU's Memorandum in Opposition to the County's Motion to Intervene, at 16.

demonstrated how these non-customers have a financial or property interest that will be impacted by this ratemaking proceeding.

4. Stand for Water's representative should not be allowed to represent other alleged customers or ratepayers as a class or group. In this regard:

. . . . Timothy Brunnert claims to be acting on behalf of SFW in signing SFW's Motion to Intervene. However, Mr. Brunnert fails to provide any factual support or verification (e.g., affidavit) to identify the members of SFW, to establish the SFW members as MPU customers/ratepayers, and to establish that he has authorization to represent SFW's interests as a group Mr. Brunnert has failed to substantiate that he can speak on behalf of other similar ratepayers, specifically SFW. Thus, for purposes of this Motion to Intervene, the Commission should treat Mr. Brunnert as solely an individual customer/ratepayer rather than an authorized representative of SFW. Even assuming, *arguendo*, that Mr. Brunnert demonstrates the requisite authority to represent SFW, . . . SFW has still failed to satisfy the intervention requirements set forth in HAR § 6-61-55.

MPU's Memorandum in Opposition to Stand for Water's Motion to Intervene, at 11-12 (footnote, text, and citation therein omitted).

5. If the commission is inclined to allow the County to participate in this proceeding, MPU will not object to the commission granting the County participant status, subject to certain stated conditions and limitations.

E.

Responses to the Commission's Information Requests

Stand for Water, at the outset of its response to PUC-IR-101, filed on September 22, 2009, explains in part:

Membership in [WMA] is mandatory for all landowners on the West End of Moloka'i. In contrast, Stand for Water is a voluntary organization made up of residents from all of the areas served and/or affected by the utilities owned by [MPL]. All of the West End landowners who belong to Stand for Water are also members of WMA. Some of the members of WMA are also members of Stand for Water.

Although there is crossover between the memberships of both organizations, a few important facts should be emphasized about the extent to which WMA represents its mandatorily enrolled membership. Specifically:

1) WMA has not held a membership meeting in at least six months. All of WMA's business is conducted by a board of directors that includes the following [six] individuals, according to WMA's current website:

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To the best of our knowledge, two of these directors . . . represent landowner [MPL's] interests on the board. This may present a conflict of interest for WMA, especially since board members are currently making decisions for the entire organization without consulting the general membership.

2) Although they were aware of Stand for Water's campaign against rate increases, none of the above-listed individual WMA board members has joined Stand for Water.

3) The WMA board decided to hire an attorney and to intervene in this rate case without any notice to its membership or any consultation with the West End community

4) In contrast to the majority of Stand for Water's membership, the majority of WMA members do not reside on Moloka'i full-time. The properties that make up the WMA membership are as follows:

Land Parcels - 320 Total
Fairway/Golfview Lots = 16
Moana Makani Lots = 32
Papohaku Ranchlands Lots = 272

Condominiums - 490 Total
Kepuhi Beach Resort = 144

Kaluakoi Villas = 148
Ke Nani Kai = 120
Paniolo Hale = 78

According to the WMA website, there are homes on only 60 of the 320 land parcels. The rest of the parcels are vacant. Most of 490 condominiums are used as seasonal vacation homes by their owners. Because most WMA members do not live permanently on Moloka'i, the disrepair of MPU's water system has not affected them as much as full-time residents, nor will higher water rates impact them as much as those who live here full-time. Stand for Water also represents part-time residents, but the majority of its membership lives here year round.

Stand for Water's letter, dated September 21, 2009, filed on September 22, 2009, at 1-2.

Stand for Water then states what while it shares with WMA "an interest in reasonable water rates, and in an efficient, legal transmission system that provides safe drinking water[.]" Stand for Water represents several interests that WMA will not address.²⁸ Specifically: (1) the protection of island water resources; (2) the protection of agriculture; (3) obtaining refunds of excessive rate charges; and (4) focusing on ensuring that MPU provides a reliable source of water at reasonable rates.

Stand for Water, in its subsequent response to PUC-IR-102, filed on September 29, 2009, explains that its representative is a customer or ratepayer of Waiola (landowner) and MPU (renter), and that "[o]ther members of the Stand for Water organization are ratepayers for MPU and/or Wai'ola[.]"²⁹

²⁸Stand for Water's letter, dated September 21, 2009, filed on September 22, 2009, at 2.

²⁹Stand for Water's letter, dated September 25, 2009, filed on September 29, 2009, at 1.

F.

MPU's Motion for Leave and Response

In its Motion for Leave filed on September 25, 2009, MPU seeks leave to respond to Stand for Water's response to PUC-IR-101, because Stand for Water "has included information which is non-responsive to the Commission's request and is an attempt by [Stand for Water] to bootstrap and supplement its intervention request with alleged bases that are beyond the scope of a rate proceeding."³⁰

In its Response that is attached to its Motion for Leave, MPU counters:

1. Stand for Water's alleged interest in protecting the adequacy and availability of Molokai's water supply was not identified in the movant's Motion to Intervene, and therefore, should not be considered by the commission as an additional basis for intervention. "Moreover, although the adequacy of Molokai's water supply is appropriately dealt with in other proceedings (i.e. before the Commission on Water Resources Management), this issue is irrelevant or not pertinent to the ratemaking issues presented in this docket and would not assist the Commission in developing a sound record."³¹

2. Stand for Water "also alleges that instead of focusing on MPL divesting itself of its utilities, the focus should be on 'insuring that MPU provides a reliable source of

³⁰MPU's Motion for Leave, at 1.

³¹MPU's Response, at 2 (footnote and citation therein omitted).

water at reasonable rates to its customers.' In its response, SFW does not elaborate on what it means by 'reliable source of water' but if SFW is asserting, as it did in its Motion to Intervene, that reliability is contingent upon MPU's legal status and obligations, . . . this issue is beyond the scope of a ratemaking proceeding."³²

The commission grants MPU's Motion for Leave, and thus, will give Stand for Water's response to PUC-IR-101 the appropriate weight in adjudicating the movant's underlying Motion to Intervene.³³

II.

Discussion

A.

Intervention

The standard for granting intervention is set forth in HAR § 6-61-55, which requires the movant to state the facts and reasons for the proposed intervention, and its position and interest thereto. HAR § 6-61-55 provides:

§6-61-55 Intervention. (a) A person may make an application to intervene and become a party by filing a timely written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant.

³²MPU's Response, at 3 (footnotes and citations therein omitted).

³³See, e.g., In re Kauai Island Util. Coop., Docket No. 2009-0050, Commission's letter, dated September 14, 2009 (granting the motion to leave to file a reply memorandum, subject to giving the reply memorandum the appropriate weight in adjudicating the underlying motion to intervene).

- (b) The motion shall make reference to:
- (1) The nature of the applicant's statutory or other right to participate in the hearing;
 - (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
 - (3) The effect of the pending order as to the applicant's interest;
 - (4) The other means available whereby the applicant's interest may be protected;
 - (5) The extent to which the applicant's interest will not be represented by existing parties;
 - (6) The extent to which the applicant's participation can assist in the development of a sound record;
 - (7) The extent to which the applicant's participation will broaden the issues or delay the proceeding;
 - (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
 - (9) Whether the applicant's position is in support of or in opposition to the relief sought.

(c) The motion shall be filed and served by the applicant in accordance with sections 6-61-21 and 6-61-57.

(d) Intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented.

HAR § 6-61-55. Moreover, intervention "is not a matter of right but is a matter resting within the sound discretion of the commission." In re Hawaiian Elec. Co., Inc., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975).

As noted by the commission in Docket No. 2008-0115, this general rate case proceeding arises out of MPL's "announcement" in late March 2008 of its intent to cease all of its business operations on the island of Molokai, including its public utility operations. In response, the commission, in

June 2008: (1) ordered the MPL Utilities to continue their provision of utility services unless and until the commission approves the transfer or surrender of their certificates of public convenience and necessity; (2) requested that the County be ready to take over the MPL public utility systems should the Utilities eventually discontinue providing service; and (3) opened its temporary rate relief investigative proceeding, Docket No. 2008-0115. Thereafter, the commission, on its own motion, approved a temporary increase in MPU's monthly water consumption charge, effective from September 1, 2008 until any superseding water rates that are approved by the commission in Docket No. 2009-0048 take effect.

The commission, in Docket No. 2008-0115, named the County as a party based on the following rationale:

The affected service territories and customers are part of the County of Maui. Moreover, the County already provides water and wastewater service in other areas on the island of Molokai. As addressed in the commission's June 13, 2008 letter to the County, the County has an interest in ensuring that its citizens have access to basic water and wastewater services. Accordingly, the commission finds good cause to include the County as a party to this proceeding.

Docket No. 2008-0115, Order Instituting a Proceeding to Provide Temporary Rate Relief to Molokai Public Utilities, Inc., Wai'ola O Moloka'i, Inc., and MOSCO, Inc., filed on June 16, 2008, at 15-16 (footnote and text therein omitted).

Conversely, the commission denied WMA's motion to intervene in Docket No. 2008-0115:

Upon review of the entire record, the commission finds that WMA's Motion lacks sufficient support, and should be denied. WMA's

members are essentially utility customers of MPU and Mosco. Pursuant to HRS § 269-51, the Consumer Advocate "shall represent, protect, and advance the interests of all consumers, including small businesses, of utility services" in the State. Thus, the Consumer Advocate is statutorily mandated to represent the interests of WMA's members in this docket, and will do so in this docket. WMA's assertions to the contrary in its Motion are unpersuasive. Moreover, WMA has not otherwise demonstrated that it has any specialized expertise or information that would be pertinent to the commission's determination of the issues in this docket. For these reasons, it does not appear that WMA's participation in this docket will assist in the development of a sound and complete record, and the Motion should be denied.

Docket No. 2008-0115, Order Denying Motion to Intervene Filed by West Molokai Association and Setting Procedural Deadlines, filed on August 8, 2008 ("Order Denying Motion to Intervene"), at 6-7 (footnote and text therein omitted).

MPU refers to the MPL Utilities' letter, dated September 8, 2008, filed in Docket No. 2008-0115, as a basis for denying movants' intervention. In this letter, the Utilities informed the commission in part:

We are now confident that the utilities are able to and therefore will remain operational for the period of the temporary rate increase . . . and therefore confirm to the Commission that the utilities will continue in operation in accordance with the Temporary Rate Relief Order, and hereby revoke and rescind all prior notices of intent to terminate operations.

Docket No. 2008-0115, MPL Utilities' letter, dated September 8, 2008, filed on September 9, 2008, at 1. Here, the commission notes that the Utilities' assurance of their continued operations appears limited to the period of the temporary rate increase granted by the "Temporary Rate Relief Order." By contrast, the scope of this proceeding, Docket No. 2009-0048,

applies to MPU's water rates that will take effect upon the termination of the temporary rates implemented by the commission in Docket No. 2008-0115, once a written decision on the merits of MPU's Amended Application is issued by the commission in this proceeding.

MPU also contends that the concerns raised by WMA and Stand for Water with respect to Well 17 and the MIS are not reasonably pertinent or relevant to this rate case proceeding. The commission disagrees.

MPU, as part of its Amended Application, seeks the commission's approval: (1) of certain Well 17 and MIS-related expenses for the Test Year;³⁴ (2) to establish a Purchased Fuel Adjustment Clause ("PFAC") that will authorize the water utility to pass onto its ratepayers changes in the fuel expenses it incurs to pump water from Well 17;³⁵ and (3) to defer and recover in future rate cases the litigation costs it will incur related to Well 17 and the MIS.³⁶ Yet, at the public hearing, MPU was unable to sufficiently respond to the commission's queries

³⁴See, e.g., Amended Application, Exhibits 6 and 10.3 (DOA - rental service expense for the Test Year, \$144,456); and Exhibit 10.2 (Well 17, fuel expense for the Test Year, \$282,524). According to MPU, the DOA - rental service expense reflects "the annual cost for the services provided to MPU by the Department of Agriculture related to the transportation of water from Well 17 to [MPU's] Mahana pump station." Amended Application, Exhibit MPU-T-100, at 29.

³⁵See Amended Application, at 12; see also id. at Exhibit MPU-T-100, at 26-28 (PFAC).

³⁶See Amended Application, Exhibit MPU-T-100, at 30-32..

concerning the status of Well 17 and the MIS.³⁷ By contrast, WMA and Stand for Water both state their ability to assist the commission in developing a sound record on these matters of great importance to the commission.

Consistent with the commission's rationale in Docket No. 2008-0115, the commission finds that the County's participation as an intervenor in this proceeding will assist the commission in developing a sound record, and its participation herein will neither broaden the issues nor unduly delay the proceeding. The commission grants the County's Motion to Intervene, subject to the applicable conditions set forth in Section III of this Order, below.

With respect to WMA, the commission acknowledges that in Docket No. 2008-0115, it denied intervention to WMA, based in part on the need to take emergency action for the purpose of averting a public health and safety hazard resulting from MPU's asserted intent to abandon its water utility service operations. Nonetheless, the commission notes that the allegations raised by WMA in its present Motion to Intervene relate to its overall interests in averting the abandonment of MPU's water utility operations without first having a third-party entity in place to take over the water utility's operations. In past utility rate cases where the commission denied the request of a homeowners'

³⁷Transcript of the public hearing held on September 3, 2009, in Kaunakakai, Molokai, at 6-9 (commission's questions about Well 17 and the MIS). MPU's representative who testified at the public hearing deferred MPU's responses to the commission's questions to Mr. Peter Nicholas, who was not present at the public hearing. Mr. Nicholas is listed by MPU in its initial and amended applications as a contact person for MPU, in the care of MPL.

association to intervene, the commission reasoned that the residents' interests were adequately represented by the Consumer Advocate.³⁸ However: (1) in those rate case proceedings, concerns over the public utility unilaterally abandoning its utility operations were non-existent; and (2) as noted by WMA, the Consumer Advocate reluctantly supported the temporary rate increase proposed by the commission in Docket No. 2008-0115 for MPU, to WMA's detriment.

Given the unique circumstances of this particular case, including MPU's previous "announcement" of its intent to cease its water utility operations, the commission finds that WMA has a direct and substantial interest in continuous and reliable water utility service at just and reasonable rates. Upon reflection herein, the commission further finds that WMA's participation as an intervenor in this proceeding will assist the commission in developing a sound record, and its participation herein will neither broaden the issues nor unduly delay the proceeding. The commission grants WMA's Motion to Intervene, subject to the applicable conditions set forth in Section III of this Order, below. In granting intervention to WMA, the commission notes that MPU's rebuttal of WMA's representation that the association was a party to the Well 17 proceeding before CWRM does not constitute a sufficient basis for denying WMA intervenor status. Nonetheless, in granting WMA intervenor status, WMA shall comply with the requirement set forth in HAR § 6-61-41(b), which states

³⁸See, e.g., In re KRWCo Corp., dba Kohala Ranch Water Co., Docket No. 05-0334, Order No. 22454, filed on May 5, 2006 (denying intervention to Kohala By the Sea Association, and instead, granting the association limited participant status).

that "[if] a motion requires the consideration of facts not appearing of record, it shall be supported by an affidavit or affidavits."

In the commission's view, Stand for Water raises legitimate concerns in its Motion to Intervene that directly affect the interests of the portion of its members who are MPU ratepayers. Moreover, based on the association's disclosure of its witness list, Stand for Water should assist the commission in developing a sound record, including matters related to Well 17 and the MIS. Finally, its participation herein should neither broaden the issues nor unduly delay the proceeding. The commission grants Stand for Water's Motion to Intervene, subject to the applicable conditions set forth in Section III of this Order, below. In granting intervention to Stand for Water, the commission finds that the entity's status as an unincorporated association, its apparent inclusion of non-ratepayer members who nonetheless "rely on the same water supply infrastructure that services of the residential customers" of MPU,³⁹ and overlapping membership with WMA in that some of the members of Stand for Water (voluntary membership) are also members of WMA (mandatory membership), do not, in this instance, constitute sufficient reasons for denying Stand for Water intervenor status. Nonetheless, Stand for Water shall comply with the requirement set forth in HAR § 6-61-41(b), which states that "[if] a motion

³⁹See Stand for Water's Motion to Intervene, at 2. According to Stand for Water, "[t]hese non-ratepayers include Ho'olehua Homestead farmers whose crops are dependent on water from the [MIS], which is used by [sic] to transport water to its West End customers." Id.

requires the consideration of facts not appearing of record, it shall be supported by an affidavit or affidavits." Lastly, Stand for Water's efforts in securing legal counsel shall not unduly delay this proceeding.

B.

MPL

"[B]ecause MPL is affiliated with the Utilities, and owns property associated with the Utilities' service territories," the commission named MPL as a party to Docket No. 2008-0115.⁴⁰ The commission reaffirmed its decision to name MPL as a party to Docket No. 2008-0115 in a subsequent order, reasoning that an integral part of the commission's consideration of MPU's revenues, expenses, and amount of rate relief required by the water utility "is the amount of funds furnished to the Utilities by MPL[,]" and hence, "[a]ny alleged outstanding obligations . . . which require MPL's participation in [Docket No. 2008-0115]."⁴¹

Here, consistent with the commission's rationale in Docket No. 2008-0115 and MPU's inability to sufficiently respond to the commission's questions concerning the Well 17 and MIS matters, the commission, on its own motion, names MPL as a party

⁴⁰Docket No. 2008-0115, Order Instituting a Proceeding to Provide Temporary Rate Relief to Molokai Public Utilities, Inc., Wai'ola O Moloka'i, Inc., and MOSCO, Inc., filed on June 16, 2008, at 15.

⁴¹Docket No. 2008-0115, Order Directing MPL to Participate in this Proceeding, filed on June 23, 2008, at 4.

to this proceeding.⁴² MPU, whether individually or jointly through its parent entity, MPL, should be able to provide the commission and other parties with the information needed in developing a complete record in this proceeding.

III.

Orders

THE COMMISSION ORDERS:

1. MPU's Motion for Leave, filed on September 25, 2009, to File a Response to Stand for Water's Response to PUC-IR-101, is granted.

2. The County of Maui's Motion to Intervene, filed on September 11, 2009, is granted, subject to the conditions noted in Ordering Paragraphs No. 6 and No. 7, below.

3. West Molokai Association's Motion to Intervene, filed on September 11, 2009, is granted, subject to: (A) the conditions noted in Ordering Paragraphs No. 6 and No. 7, below; and (B) the additional condition that by October 30, 2009, WMA shall file with the commission, with copies served upon the other parties, one or more affidavits that support the facts (and not arguments) set forth in its Motion to Intervene.

4. Stand for Water's Motion to Intervene, filed on September 14, 2009, is granted, subject to: (A) the conditions noted in Ordering Paragraphs No. 6 and No. 7, below; and (B) the additional condition that by October 30, 2009, SFW shall file

⁴²To reiterate, MPU's representative at the public hearing deferred the commission's questions regarding Well 17 and the MIS to Mr. Nicholas, who is listed by MPU in its initial and amended applications as a contact person for MPU, in the care of MPL.

with the commission, with copies served upon the other parties, one or more affidavits that support the facts (and not arguments) set forth in its Motion to Intervene. In addition, Stand for Water's efforts in securing legal counsel shall not unduly delay this proceeding.

5. MPL is named as a party to this proceeding.

6. The intervenors' participation in this proceeding will be limited to the issues raised in this docket. The commission will: (A) preclude any effort by the intervenors to unreasonably broaden the issues, or unduly delay the proceeding; and (B) require the intervenors to meaningfully participate in the docket. The commission will reconsider the intervenors' participation in this docket if, at any time, during the course of this proceeding, the commission determines that one or more of the intervenors are: (A) unreasonably broadening the pertinent issues raised in this docket; (B) are unduly delaying the proceeding; or (C) failing to contribute to the development of a sound record, meaningfully participate in this proceeding, or follow the commission's rules or orders.

7. Consistent with Ordering Paragraph No. 2 of the commission's Order Regarding Completed Amended Application and Other Initial Matters, filed on July 29, 2009, the Parties shall submit a stipulated prehearing order for the commission's review and consideration within ten days from the date of this order. If the Parties are unable to agree on a stipulated prehearing order, each of the parties shall submit its own proposed prehearing order by the same date.

8. In the event that the Parties file individual proposed prehearing orders due to their lack of agreement on a stipulated prehearing order, the commission will not hold a hearing on the proposed prehearing orders.

DONE at Honolulu, Hawaii OCT 16 2009.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By John E. Cole
John E. Cole, Commissioner

APPROVED AS TO FORM:

Michael Azama
Michael Azama
Commission Counsel

2009-0048.cp

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
MOLOKAI PUBLIC UTILITIES, INC.)
For Review and Approval of Rate)
Increases, Revised Rate Schedules,)
and Revised Rules.)

Docket No. 2009-0048

OPINION OF LESLIE H. KONDO, COMMISSIONER,
CONCURRING IN PART AND DISSENTING IN PART

I respectfully concur in part and dissent in part.


I do not believe that it is appropriate for the commission to name Molokai Properties Limited ("MPL") as a party to the docket. MPL does not hold a commission-issued certificate of public convenience and necessity and based on the current record, is not subject to regulation by the commission. Moreover, in my opinion, MPL's participation in the docket is not necessary for the commission to establish the appropriate rates and charges or to consider the other relief requested in the Amended Application.

I concur with the majority with respect to all other matters set forth in the Order.

DONE at Honolulu, Hawaii

OCT 16 2009

By


Leslie H. Kondo, Commissioner

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

CATHERINE P. AWAKUNI
EXECUTIVE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
P. O. Box 541
Honolulu, HI 96809

PETER A. NICHOLAS
MOLOKAI PROPERTIES LIMITED
119 Merchant Street, Suite 408
Honolulu, HI 96813

MICHAEL H. LAU, ESQ.
YVONNE Y. IZU, ESQ.
SANDRA L. WILHIDE, ESQ.
MORIHARA LAU & FONG LLP
841 Bishop Street, Suite 400
Honolulu, HI 96813

Counsel for MOLOKAI PUBLIC UTILITIES, INC.

MICHAEL J. HOPPER, ESQ.
DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 South High Street
Wailuku, HI 96793

Counsel for the COUNTY OF MAUI

WILLIAM W. MILKS, ESQ.
LAW OFFICE OF WILLIAM W. MILKS
ASB Tower, Suite 977
1001 Bishop Street
Honolulu, HI 96813

Counsel for WEST MOLOKAI ASSOCIATION

TIMOTHY BRUNNERT
PRESIDENT
STAND FOR WATER
P. O. Box 71
Maunaloa, HI 96770